

of his illness, or of the absence, death, illness, negligence or misconduct of his election agent or of any clerk or officer of such agent, or by reason of inadvertence or of any reasonable cause of a like nature, and not by reason of any want of good faith on the part of the applicant, the court may make an order for allowing the authorised excuse for the failure to transmit such return and statements (section 30(1)(a)).

In the present case the applicant was the unsuccessful candidate at the parliamentary bye-election for Segamat Utara, Johore held on 19th October, 1968. He had an election agent, Lim Kit Siong, who was required to transmit the return to the returning officer, Segamat Utara on or before 15th December, 1968. It was the first time the applicant stood for election. In his affidavit he declared that he had no experience of election campaigns or of submitting election expenses. The said agent was then pre-occupied with the State of Selangor bye-election for Serdang between 28th November, 1968 to 28th December, 1968 and he had left the preparation of the return to another person. That person had prepared the said return but not in proper form because the vouchers attached thereto were not itemised. It was first transmitted to the returning officer on 23rd December, 1968 but was naturally rejected, was again transmitted on 29th December, 1968 but was not in proper form and was finally transmitted on 29th March, 1969.

The grant for an authorised excuse is solely discretionary and not arbitrary; the discretion must be exercised in accordance with sound and reasonable judicial principles. I am therefore not fettered by any judicial decisions. The cases providing for a guide to courts to exercise the discretion one way or other are only illustrative; they are not intended to be exhaustive. In other words, each case must depend on its own merits. The application in the present case is made by the unsuccessful candidate and not by the agent. It may well be that different considerations would apply in the case of the agent but for the purpose of the present application I express the view that the applicant has shown by his affidavit that the failure to transmit the return was not by reason of any want of good faith on his part but due to inadvertence of his agent. I therefore propose to relieve the applicant and allow him to transmit the said return on 29th March, 1969.

Enche Ariffin for the successful candidate has quite properly referred me to a case which is pertinent and which may, if I may say so, serve as a reminder to future election agents of their duties under the election law. If I may echo the words of Sanky J. in *Ex parte Polson & Anor.*⁽²⁾ :—

"A person of no skill and knowledge could not obtain a post as election agent and neglect his duties altogether so as gravely to imperil the success of the candidate or that candidate's right to sit in Parliament, and then come to the court and obtain relief because he had acted without any corrupt motive. I hope that no man of that sort would be employed as an agent in future."

Order accordingly.

Application granted.

Solicitors: K.L. Devasar & Co.; Ariffin & Ooi.

LIM OW GOIK & ANOR. v. SUNGEI MERAH BUS COMPANY LTD.

[O.C.J. (B.T.H. Lee J.) April 9, 1969]

[Sibu — Civil Application No. 1 of 1968]

Companies — Transfer of shares — Registration — Application for rectification of register — Private company — Refusal by directors — Whether proper exercise of discretion by directors — Companies Act, 1965, s. 162.

In this case the second applicant had sold 15 shares in the company to the first applicant and sent a notice to the directors. The directors informed the second applicant that his application for disposing of his shares to the first applicant could not be approved, but it could be considered for approval provided he gave the pre-emption right equally to all the existing shareholders. The articles of association of the company provide that the directors may decline to register any transfer of shares to a person of whom they do not approve and may also decline to register any transfer of shares in which the company has a lien.

Held: (1) although if the directors had simply expressed their opinion it would not be for the court to examine or to inquire into the ground on which they had formed their opinion, in this case, the directors had exercised their power for a reason not empowered by the articles of the company and therefore this was an improper exercise by the directors of the powers vested in them;

(2) the second applicant had therefore a legal right in favour of his claim and the court must give effect to it by ordering the company to register the transfer.

Cases referred to:—

- (1) *Re Hadleigh Castle Gold Mines, Ltd.* [1900] 2 Ch. 419.
- (2) *In re Coalport China Co.* [1895] 2 Ch. 404.
- (3) *In re Smith and Fawcett Ltd.* [1942] 1 Ch. 304.
- (4) *Kesar Singh v. Sepang Omnibus Co. Ltd.* [1964] M.L.J. 122.
- (5) *In re Bede Steam Shipping Co. Ltd.* [1917] 1 Ch. 123.
- (6) *Re Bell Brothers* (1891), 65 L.T. 245, 246.
- (7) *Re Gresham Life Assurance Society, Ex parte Penny* 28 L.T. Rep. N.S. 150.
- (8) *The Ocean Coal Co. Ltd. v. The Powell Duffryn Steam Coal Co. Ltd.* [1932] 1 Ch. 655.

CIVIL APPLICATION.

C.C. Joseph for the applicants.

Lee Wee Gek (Miss) for the respondent.

Cur. Adv. Vult.

B.T.H. Lee J.: This is an application by way of motion by the applicants under section 162 of the Companies Act (No. 79 of 1965) for the rectification of the register of the Sungei Merah Bus Company Limited (hereinafter referred to as "the company") by inserting the name of Lim Ow Goik in the place of Goh Teck Sing as the holder of 15 shares in the company which Goh Teck Sing had sold and transferred to Lim Ow Giok but the transfer of which the directors had refused to register.

The issues before the court are two-fold:—

First, whether the special resolution to amend clause 26 of the articles at the extraordinary general meeting held on 11th September, 1966, was valid;

Second, whether the directors in refusing to register the transfer had failed to exercise their powers *bona fide* and with due regard to the shareholder's right to transfer his shares.

It is not necessary to travel in detail through all the facts but for a proper understanding of the matter I must state shortly the circumstances which led up to the motion.

Being desirous of selling his shares applicant No. 2 Goh Teck Sing wrote on November 17, 1966 to the company as follows:—

"Goh Teck Sing,
c/o Hiap Hin Retreated Tyres Co.
P.O. Box 267, Sungei Merah,
Sibu, 17th November, 1966.

The Chairman,
Board of Directors,
Sungei Merah Bus Co. Ltd.,
Sibu.

Dear Sir,

Notice is hereby given that I have the intention to sell all my 15 shares in Sungei Merah Bus Co. Ltd. and wish to offer them at the total price of \$19,500 (Dollars Nineteen Thousand Five Hundred) only, with the first chance for the company to take them up.

The above mentioned price is only held good for 14 days from date hereof, and if the company has no interest to purchase them. they will be offered for sale to any third party after the lapse of 14 days without further notice.

Yours faithfully,
(Sgd.) Goh Teck Sing,
(in Chinese)."

The reply from the managing director is in the following terms:—

Mr. Goh Teck Sing,
c/o Hiap Hin Retreated Tyres Co.,
P.O. Box 267,
Sungei Merah Bazaar,
Sibu,

"25th November, 1966.

A Dear Sir,

Proposal of Share Transfer

We acknowledge receipt of your letter of 17th November, 1966 giving 14 days' notice for existing members of the company to take up your shareholding at the price of \$19,500 for 15 shares (i.e. 15 of the 340 shares of the whole company).

Members of the company have expressed their willingness to take up your shares at the highest ruling price at \$1,000 per share (i.e. 1 of the total of 340 shares of the company at \$500 — face value), or \$15,000 for your 15 shares.

Should you be unwilling to dispose of your shares at this offer or intend to dispose of your shares to outsiders at higher price, you have to apply to the board of directors for approval of the transferee. Unless the person who buys your shares is approved by the board of directors of the company, your transfer of shares to anyone is not valid and not recognised by the company.

Yours faithfully,
For Sungei Merah Bus Co. Ltd.
(Sgd.) Lau Yong Gee,
(in Chinese).
Managing Director."

The matter was raised again on February 25, 1967, when Goh Teck Sing wrote to the company. It runs thus:—

"Goh Teck Sing,
52, Sungei Merah, Sibu,
25th February, 1967,

The Chairman,
Board of Directors,
Sungei Merah Bus Co. Ltd.,
Sibu.

F Dear Sir,

I wish to inform you that I have now sold all my 15 shares in the Sungei Merah Bus Co. Ltd. Sibu, vide my Share Certificate No. 21 and 63, for the total sum of \$16,000 to Mr. Hii Siong Lai of Sungei Teku, Sibu, and have received a sum of \$5,000.

G I regret to have sold the above shares to Mr. Hii Siong Lai, because the company can only offered (sic) me less than the above price.

Yours faithfully,
(Sgd.) Goh Teck Sing,
(in Chinese)."

H The secretary on behalf of the company replied on 16 March, 1967 as follows:—

Mr. Goh Teck Sing,
c/o 52, Sg. Merah Bazaar,
Sibu, Sarawak.

Dear Sir,

*Re: Sale of Share to HII SIONG LAI
by GOH TECK SING*

With reference to your letters dated 25th February, 1967 and 10th March, 1967, we have to inform you that we held a directors' meeting on 13th March, 1967, at 5 p.m. and at the meeting it was decided that the company would decline to register the above transfer of shares under section 26 of the company's memorandum and articles of association.

We hereby give you notice of our refusal to register the above transfer of your shares to Hii Siong Lai.

Yours faithfully,
Sg. Merah Bus Company Limited,
(Sgd.) Lau Kim Hoon,
(in Chinese).
Secretary."

The matter was not pursued until 25 March, 1968 when Goh Teck Sing agreed to sell his shares to Lim Ow Goik applicant No. 1 (a registered shareholder holding 10 fully paid shares in the same company) for \$21,000, and in pursuance of which he forwarded a notice to the company.

The company refused to register the transfer to Lim Ow Goik and informed the applicant by letter dated 7th June, 1968. As it is vital to the case I set it out in full.

Mr. Goh Teck Sing,
c/o Hiap Hin Tyre Retreaded Co.,
52, Sungei Merah Bazaar,
Sibu.

Dear Sir,

Share Transfer

With reference to your letter of 25th March, 1968 which we received on 23rd May, 1968, we wish to inform you that your application for disposing of your shares to Mr. Lim Ow Goik cannot be approved, but it can be considered for approval provided you give the pre-emption right equally to all the existing shareholders.

If you agree, please present yourself at the registered office of our company for the execution of fresh deeds of transfer.

Yours faithfully,
Sungei Merah Bus Berhad,
(Sgd.) Lau Yong Bee,
(in Chinese)."

Following the board's refusal to register the transfer this motion was brought on.

The first question in this action raises a short point as regards the validity or otherwise of the resolutions purported to have been passed by the company and it is convenient to dispose of that point at once.

At this stage it should be stated that the material provisions of article 26 of the articles of association of the company incorporated regulation 22 of the regulation for management of a company limited by shares in the Fourth Schedule to the Companies Act, 1965.

Article 26, the material portion of which, provides that —

"The directors may decline to register any transfer of shares *not being fully paid shares* to a person of whom they do not approve and may also decline to register any transfer of shares on which the company has a lien." (The emphasis is mine).

What then, according to the company took place on 11 September, 1966, is said to have been an extraordinary general meeting at which

A a number of special resolutions, all reduced into Chinese, one of which was the amendment of article 26 by deleting the words "not being fully paid shares" in the second line of that article.

B A translation of the special resolutions was forwarded in duplicate to the Registrar of Companies, Kuching, for filing on 12 October, 1966.

C A great deal of argument was directed to the meaning of the words "Ee Chok Ann" — Chinese translation for the word "Resolution" — whether the expression meant "Resolutions to be passed" or "Resolutions which have been passed". It is sufficient here to say that both counsel agree the expression may mean both.

D The question then arises was the resolution "the phrase 'shares not being fully paid' appearing in the second line in clause 26 be accordingly deleted" passed at the general meeting of the company a valid resolution.

It must here be observed that the majority of the members in the company read and understand Chinese but none of them are educated in English.

E Another important circumstance in this case is that Lim Ow Goik was present at the meeting when the resolutions were passed and signed his name under the heading "Signature of shareholders present".

F In consequence he is by no means so absolutely ignorant as not to be able to gather some sort of idea of the resolutions dealing with matters connected with the company.

A qualified accountant employed by the company acted as secretary and recorded the minutes and the resolutions passed by the board.

G It has been argued that assuming the resolutions were invalid, it follows there would be no power of the company to refuse to register the shares.

H Now it is important to note that the resolutions were passed on 11 September, 1966, i.e. nearly two years before the application for transfer by Goh Teck Sing to Lim Ow Goik, and about 1½ months before Goh Teck Sing ever conceived the idea of selling his shares to the company. If it were otherwise it would be open to suspicion.

I At this point it falls to be observed that the provisions of the Act provide for the infliction of penalties upon directors and officers who neglect to properly conduct the meeting and send false returns.

I have no doubt whatever that the chairman did put to the meeting the resolutions, due notice of which had been given and which had been passed.

The proceedings at the general meeting were perfectly regular under the articles of association. I must upon the authority of *Hadleigh Castle Gold Mines, Limited*⁽¹⁾ hold that the direction of the chairman is conclusive and that the resolutions were in fact passed.

I turn now to the vital question as to whether the directors in refusing to register the transfer had failed to exercise their powers *bona fide* and with due regard to the shareholder's right to transfer his shares.

I have had cited to me authorities which seem to me to establish that where directors act under an article in form similar to that which I have here, namely article 26, the directors' refusal to register a transfer cannot be questioned in the absence of actual evidence that they have not acted *bona fide*.

References were made to *In re Coalport China Co.*,⁽²⁾ *In re Smith and Fawcett Ltd.*⁽³⁾ and *Kesar Singh v. Sepang Omnibus Co. Ltd.*⁽⁴⁾ (and as to the first case I shall say a word later).

It is to be pointed out at the very outset that shares being personal property are *prima facie* transferable. Some form of control may be necessary in the case of a private company such as this and some form of restriction may be required.

It is recognised that the directors are in a fiduciary position both towards the company and towards every shareholder in it.

On the proposed transfer of the shares to Lim Ow Goik coming before the board of directors, they, acting as they alleged under their powers contained in the article of association refused to accept Lim Ow Goik as the transferee of the shares.

It is plain on the authorities that this court will not interfere with the exercise of discretion by the directors unless they have erred in principle or there is no material on which they could properly have arrived at their decision.

Both applicants Lim Ow Goik and Goh Teck Sing now apply to enforce the registration of the shares, and filed affidavits accordingly.

The chairman of the company, Lau Yong Bee, filed an affidavit in reply and one point is relevant, namely, paragraph 5 —

"It was resolved at the said meeting that the respondent company could only consider applicant Goh Teck Sing's application to register any transfer of his shares if the said shares were to be sold to all the existing members of the respondent company in equal shares at the same purchase price of \$21,000".

The chairman has in his supporting affidavit indicated his desire to buy over the shares from applicant at the price offered to Lim Ow

A Goik. It cannot therefore be a denial of justice if the company now takes over the shares from the applicant at the price which the latter was willing to sell.

B It seems to me it would have been a breach of duty on the part of the directors, who were to hold an equal hand as between all the shareholders, to show a favour to one particular shareholder under the circumstances of the case, more than to another. Or if it is the desire of the directors to acquire all or some or any of the shares for themselves and the other members at an under value or disposing them at a discount.

C There is therefore no suggestion of the slightest lack of probity or unfair advantage or anything of the sort on the part of the company.

D The applicant sought the permission of the company to sell the shares at the price quoted by him and having obtained the price which the company wishes to buy over now complains that he wishes to sell it to someone else at the same price.

E It is settled law that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company and that he must exercise his powers for the general interests of the company.

F The court has not overlooked or ignored the principle laid down by Lord Greene in *Smith and Fawcett Ltd.*⁽³⁾ that the directors must exercise their discretion *bona fide* in what they consider — not what a court may consider — is in the interests of the company, and not for any collateral purpose.

G The question, then, is whether on the true construction of the article and having regard to the general law on the subject, the directors were justified as between themselves and Lim Ow Goik in refusing to register the transfer.

H *Kesar Singh v. Sepang Omnibus Co. Ltd.*⁽⁴⁾ a case which counsel for the company relied in order to dispose of this argument appears to me at first the case most strongly in favour of the contention of the company. However upon looking at it, I think it will be found to be very distinguishable from this case as it turned entirely upon the peculiar facts of that case.

I There is an allegation, and I say no more than that, as to the hostile designs of the transferor actuated it seems by allegedly interested motives to sell the shares to the detriment of the interest of the company.

I may here deal with the argument put forward by counsel for the applicants.

It is this. It is to the transferee, i.e. Lim Ow Goik and to his qualifications or disqualifications as the case may be, and not to the transferor's and his supposed motives, that the attention of the board must be directed.

The cross-examination of the chairman of the company added little or nothing to this and was confined to the transferor and not to the transferee.

Counsel for the applicants cited in support of his argument *In re Bede Steam Shipping Company Limited* ⁽⁵⁾ where reference was made to *In re Coalport China Co.* ⁽²⁾ and the judgment of Chitty J. in *re Bell Brothers* ⁽⁶⁾ where he said:—

"The directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting."

and then he goes on to say a little further down in his judgment:—

"A power to approve a transferee is confined to the transferee personally."

I have examined the articles in *re Bell Brothers*, and although the terms of the articles are worded differently, the substance of the restrictions is in my opinion the same as article 26.

For convenience, I set out the material provisions of the article in that case.

"Art. 18. Every person whose name is entered on the register of members as the holder of any shares or stock shall be entitled to sell and transfer such shares or stock to any person who may be approved of by the directors, ..."

Art. 34. The directors shall have an absolute discretion as to accepting or rejecting any transfer of shares or the nomination of any person to be a member under any of the provisions contained in the article, . . ."

Much to the same effect was the statement of James L.J. in *Re Greham Life Assurance Society, Ex parte Penney*. ⁽⁷⁾ He said:—

"It was there held that the directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the board."

It is, in my opinion, consistent with all the authorities, *Ex parte Penney* ⁽⁷⁾ and in *re Bell Brothers* ⁽⁶⁾ to say that, subject to certain restrictions alluded to above, it is not competent for the directors to deprive a brother shareholder of his rights as a shareholder and of the power to dispose of his shares to any person whatsoever.

I find it impossible to see how the present case can be taken outside the ambit of the principle as stated by Chitty J. as long ago as 1891 in the passage I have read.

A Those being the principles which have been established by the decided cases on the point now before the court, I come now to apply them to the facts before me.

B By his affidavit the chairman of the company Lau Yong Bee explains why the company refused to register the transfer. He gives the reason. It is that an application for disposing of the shares can be considered for approval provided the pre-emption right is given equally to all the existing shareholders.

C It is of particular significance that evidence by way of affidavit and oral evidence made no objections whatever to Lim Ow Goik.

D It would have been a different matter if the affidavit of the chairman had alluded to the fitness of the transferee or if the minutes of the meeting had mentioned it, as was in the case of *Kesar Singh v. Sepang Omnibus Co. Ltd.* ⁽⁴⁾

E In that case there was evidence to show that the applicant had shown hostile intentions which must necessarily be a source of embarrassment to the company. Although these facts were not set out in the minutes of the directors' meeting they appeared in the affidavits of the two directors in that case.

F In the instant case the applicant is already a member of the company holding 10 fully paid shares and the chairman of the company stated categorically that the directors of the company have the power to prevent or reject any member becoming a director, although eligible to become one.

G It is unfortunate, if these last answers disclose additional reasons which indeed operated in the minds of the directors that they were not stated earlier and included in the record of the minutes or in the affidavit, or both.

H Were they the reasons which led to the refusal to register. It seems to me that they were the motives of the transferor and not the motives of the transferee.

I Such reasons as to the motives of the transferor appear to me upon the authority of Chitty J.'s judgment in *Re Bell Brothers Ltd.* ⁽⁶⁾ irrelevant and as regards the apprehensions of future trouble, apart from being hearsay, they are grounded on the attitude of the transferor and not of the transferee.

Again, if the articles of the company provide that before transferring to any person, the shares shall be offered on certain terms to the other shareholders in the company, a shareholder takes subject to that restriction such as is found in *The Ocean Coal Co. Ltd. v. The Powell Duffryn Steam Coal Co. Ltd.* ⁽⁸⁾ and *In re Coalport China Co.* ⁽²⁾ and he cannot transfer

his shares without having first made an offer of the shares to the shareholders.

There appears to be nothing in the articles of this company which imposes on a shareholder an obligation in regard to pre-emption by existing shareholders.

I agree that, if the directors had simply expressed their opinion and the court knows nothing more about it, it would not be for the court to examine or to inquire into the ground on which they had formed that opinion.

For the purposes of the present case, I think I am only concerned with one aspect of the question.

The court must in the end ask itself a subjective question whether it is content to let the matter stand as it is, or whether there is not some lurking doubt in its mind which makes one wonder whether an injustice has been done.

As was stated by Chitty J. in *Re Bell Brothers Ltd.*⁽⁶⁾ the power conferred on the directors by the articles of the company does not justify them in rejecting a transfer on the ground that the transferee, against whom they entertained no objection, is the proposed transferee of some person whom they consider objectionable. This decision has never been questioned and I take it to lay down the law on the subject.

Though I have much sympathy with the board of directors of the company and I think in ordinary circumstances I should have dismissed the application in their favour, since the true interests of the company would be best served by a sale to all the other members of the company and not to the proposed transferee alone, nevertheless in my judgment the law is clearly against them and I would therefore allow the application of the applicants.

I ought now to consider whether there was proper exercise by the directors of the powers vested in them and I hold there was not in as much as they have exercised it for a reason not empowered by the articles.

In the view that I take, it is not necessary for the court to engage in the determination of the other question as to whether the directors have acted *bona fide*.

The applicant has a legal right in favour of his claim and the court must give effect to it by ordering the company to register this transfer and to pay him his costs of this application

Application allowed.

NG CHENG HO v. TAN EK SENG & ANOR.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Choor Singh J.) April 16, 1969]

[Singapore—Federal Court Civil Appeal No. Y1 of 1969]

Negligence — Liability of master for safety of his workmen — Safe system of work — Common law duty.

Master and servant — Duty of master — Safe system of working.

The appellant, a lorry attendant, fell off the back of the lorry where he was with another attendant, and sustained injuries. He sued both the driver of the lorry and his employer. The trial judge held that appellant had failed to prove that his injuries were caused by the negligence of the first respondent or by any breach of any statutory duty on the part of the second respondent. He found that the appellant fell off the lorry because he had failed to look after his own safety and that the accident was due to his sole negligence. On appeal, the appellant contended that the respondents being under a common law duty to take reasonable care to provide a reasonably safe system of work had failed in the circumstances prevailing at the time to do so.

Held, dismissing the appeal: in this case the appellant had not only failed to allege what was the defect in the system but he also failed to prove any defect in the system provided by the second respondent. Furthermore, on the facts there was not only no defect in the system provided but also, on the appellant's own admission, the accident would not have occurred had he adhered to the system provided.

Case referred to:—

(1) *Colfar v. Caggins & Griffith (Liverpool) Ltd.* [1945] 1 All E.R. 326.

FEDERAL COURT.

Ng Kian Fong for the appellant.

C.S. Wu for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the judgment of the court): The appellant was employed by the second respondent as a lorry attendant. His duties were to load sand from a sand-pit on to a lorry and to accompany the loaded lorry to its destination. He had been so employed by the second respondent for a period of two years prior to the day of the accident.

On the day of the accident he was the attendant of a lorry No. SG 3284 belonging to the second respondent which was being driven by the first respondent who was also an employee of the second respondent. This lorry on that day was being used to load sand from a sand-pit which was situate at the end of an earth road off Peng Ann Road. This earth road which was 15' 10" wide sloped down from Peng Ann Road to the sand-pit and was full of pot holes of varying widths and depths.

The appellant was the regular attendant of that lorry but on that day accompanying him was another lorry attendant employed by the second respondent. This other lorry attendant